Outdoor Venture Corporation (O.V.C.) *and* Union of Needletrades, Industrial, and Textile Employees (UNITE), AFL–CIO Tennessee & Kentucky Division. Cases 9–CA–34709, 9–CA–35175, and 9–CA–35372

November 9, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On September 15, 1999, Administrative Law Judge James L. Rose issued the attached decision.[1] The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief. In addition, the Respondent filed cross-exceptions and a supporting brief, the Charging Party filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified[2] and to adopt the recommended Order.

In its exceptions, the Union contends, inter alia, that the judge erred in finding that a strike by the Respondent's employees, which was admittedly economic in nature at its inception, was not converted to an unfair labor practice strike. For the reasons stated by the judge, and the additional reasons set forth below, we find that any unfair labor practices the Respondent may have committed did not contribute to prolonging the strike.

The relevant facts can be summarized as follows. The Respondent manufactures military tents. The Union represented the Respondent's production and maintenance employees for many years leading up to the 1996 strike at issue here. In the fall of 1995, the Respondent and the Union began negotiations for a new collective-bargaining agreement to replace their existing contract, which expired in November 1995. The time study system used to determine rates of pay, and the rates themselves, were key issues. The Respondent and the Union were unable to reach an agreement that satisfied the employees. About August 12, 1996, the employees began a strike, which the parties agree was economic at its outset.

During the strike, the parties continued negotiating. About September 26, 1996,[3] the Respondent's president and chief executive officer, J.C. Egnew, met with strikers on the picket line and discussed a wide range of matters that were also subjects of negotiations. About October 4, the Respondent tendered a new contract proposal, which the employees rejected.

About November 9, a representative for the International Union met with about 35 of the 88 strikers. He told them that the Respondent had been committing unfair labor practices, including Egnew's September 26 meeting with strikers on the picket line, and that employees should consider changing the strike to an unfair labor practice strike. The 35 strikers present voted to continue the strike as an unfair labor practice strike. The testimony reflects, however, that employees mistakenly believed that unsatisfactory wages and other economic issues were unfair labor practices. For example, one employee testified that "we all agreed that [the strike] was an unfair labor practice from the beginning or should have been," based on "the amount of money being made" and other economic issues.

About November 16, employees voted to reject another contract proposal, which the Respondent had made sometime in mid-November. The Respondent then began hiring replacements.

The strike continued until about February 26, 1997, when the Union made an unconditional offer to return to work on behalf of the striking employees. The Respondent refused to offer immediate reinstatement on the basis that the strike was economic and the strikers had been permanently replaced. About March 6, 1997, the Respondent withdrew recognition from the Union, relying on a decertification petition signed by a majority of its work force, including replacements.

The complaint alleges that Egnew engaged in unlawful direct dealing at the September 26 meeting, and that this direct dealing converted the strike into an unfair labor practice strike. Therefore, the complaint alleges that the

[1] Previously, on February 19, 1999, the Board issued a Decision and Order denying the Respondent's Motion for Summary Judgment in Case 9–CA–34709. *Outdoor Venture Corp.,* 327 NLRB 706 (1999).

[2] We correct three inadvertent errors by the judge, which do not affect our decision. In sec. III, A of his decision, the judge found that the parties began negotiations for a new collective-bargaining agreement in the summer of 1996. In fact, they began negotiations in the fall of 1995. Also in sec. III, A, the judge found that Ella Massengale, the Union's chief steward, testified that the strike would have ended if the Respondent had agreed to pay $7.50 per hour. In sec. III, B, 2, the judge attributed the same testimony to "General Counsel witnesses." No witness gave this precise testimony. Massengale did testify, however, that the employees wanted $7.50 per hour and that the strike would have ended "with the management [problems] being settled and the rates being settled and then a decent wage." We are satisfied that these minor errors do not undermine the judge's conclusions that the Respondent's direct dealing did not contribute to prolonging the strike.

[3] All dates are in 1996 unless otherwise specified.

Respondent violated Section 8(a)(3) and (1) by failing to reinstate the strikers on their unconditional offer to return to work.[4] In addition, the complaint alleges that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union in March 1997. Finally, the complaint alleges that the Respondent violated Section 8(a)(5) and (1) by ceasing to withhold union dues in August 1997 pursuant to a checkoff arrangement authorized by the collective-bargaining agreement, which had expired in November 1995.

As the Board has recently explained:

> It is well established that a work stoppage is considered an unfair labor practice strike if it is motivated, at least in part, by the employer's unfair labor practices, even if economic reasons for the strike were more important than the unfair labor practice activity. It is not sufficient, however, merely to show that the unfair labor practices preceded the strike. Rather, there must be a causal connection between the two events.

Golden Stevedoring Co., 335 NLRB No. 37, slip op. at 2 (2001) (citations omitted).

The judge found that the Respondent engaged in unlawful direct dealing at the September 26 meeting on the picket line.[5] He also found, however, that the General Counsel failed to prove that the direct dealing contributed to prolonging the strike. Accordingly, he concluded that the strike remained economic at all times and, therefore, that the Respondent did not violate Section 8(a)(3) and (1) by failing to reinstate the strikers on demand. For the reasons stated by the judge, we agree.

Our dissenting colleague argues that a remand is necessary because the judge failed to resolve conflicting testimony on what Egnew said to strikers at the September 26 meeting. We disagree. Even crediting the testimony most favorable to the Union—that Egnew told the strikers to "trust him" and stated in general terms that he would "fix" their problems—and assuming that that testimony establishes unlawful direct dealing, the General Counsel failed to prove that Egnew's picket-line conduct contributed to prolonging the strike. The evidence does not establish that the direct dealing itself caused any consternation among the strikers or strengthened their resolve to continue striking. The General Counsel's own witnesses testified that strikers' feelings toward Egnew were positive after the September 26 meeting. The strikers did not become upset until they received the Respondent's October 4 contract proposal, which they viewed as inadequate and even regressive.[6] Although witnesses testified that after the October 4 proposal the strikers were angry at what they viewed as Egnew's "lies" and "broken promises," there is no evidence that the strikers were upset that Egnew had made the alleged promises directly to them rather than through the Union, or that they felt Egnew had undermined or denigrated the Union by doing so. In addition, some of the same witnesses who testified that they felt Egnew had lied and broken his promises also testified that they continued striking because the Respondent failed to propose an acceptable contract, and that the strike would have been settled if wages and other economic issues had been resolved.[7] Furthermore, the vote to convert the strike apparently was based on the mistaken belief that unsatisfactory wages and economic issues were unfair labor practices. One employee testified that "we all agreed that [the strike] was an unfair labor practice from the beginning or should have been," based on "the amount of money being made" and other economic issues.

In light of this evidence, the General Counsel has failed to carry his burden to prove that unlawful direct dealing converted the strike into an unfair labor practice strike. Accordingly, we agree with the judge that the strike remained economic at all times, and that the Respondent did not violate Section 8(a)(3) and (1) by failing to reinstate the strikers on demand. See, e.g., *Forest Grove Lumber Co.*, 275 NLRB 1007, 1007 fn. 1 (1985) (because there was no causal connection between the respondent's direct dealing and continuation of the strike, the strike remained economic at all times). We therefore find a remand unnecessary.[8]

[4] The complaint seeks no remedy for the direct dealing itself, which was the subject of a settlement approved by the Regional Director on January 31, 1997. See the discussion of the settlement agreement in our prior decision cited in fn.1, supra.

[5] About September 10, Egnew's predecessor, Larry Lockhart, had a similar meeting with the strikers. The judge found that Lockhart engaged in unlawful direct dealing at that meeting. The Union argues only that Egnew's direct dealing, not Lockhart's, prolonged the strike.

[6] The Union's original charge, filed November 27, alleged regressive bargaining. On January 13, 1997, however, the Regional Director dismissed that portion of the charge. Consequently, there is no contention in this case that unlawful regressive bargaining prolonged the strike.

[7] For example, striker Janet Duncan testified that she concluded Egnew had lied to employees because "he offered us another contract" that was "less than what we had been offered when Larry [Lockhart] was president." Picket Captain Lloyd Lynch testified that employees' attitudes changed after the October 4 proposal because "the people felt like the contract was no different than the one they had just [gone] on strike over." He further testified that at the time of the November 9 meeting, employees were "upset" over "the contract proposal." Similarly, in discussing employees' reactions to the Respondent's mid-November proposal, Chief Steward Ella Massengale testified that employees "couldn't understand why [Egnew] had [gone] backward in his bargaining and that they [were] very disappointed in the contract or the proposals that [were] presented to them."

[8] In addition to remanding the case to resolve the conflicting testimony about Egnew's statements at the meeting, our dissenting col-

Because the strike was economic, the Respondent was entitled to hire permanent replacements. Therefore, the Respondent lawfully relied on the signatures of those replacements in concluding that the decertification petition had been signed by a majority of its work force. Accordingly, we agree with the judge that the Respondent did not violate Section 8(a)(5) and (1) by withdrawing recognition from the Union.

Finally, the judge found that the Respondent lawfully ceased withholding union dues in August 1997. We agree. The Respondent's obligation to withhold dues ceased in November 1995, when the collective-bargaining agreement creating that obligation expired. See *Hacienda Resort Hotel and Casino,* 331 NLRB No. 89, slip op. at 3 (2000).[9] We need not rely, as the judge did, on the fact that the Union ceased to be the bargaining representative before the Respondent stopped withholding dues.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. November 9, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

Contrary to my colleagues, I would remand this case to the judge to explicitly resolve a material conflict in the testimony and determine precisely what was said at a critical September 26, 1996[1] meeting between the Respondent and strikers on the picket line. Because the Respondent's conduct at this meeting is alleged to constitute direct dealing that prolonged the strike, I would not pass at this point on the lawfulness of the Respondent's refusal to reinstate the strikers on demand or the Respondent's withdrawal of recognition from the Union.[2]

The employees began an economic strike about August 12. During the strike, the parties continued negotiating for a new collective-bargaining agreement. About September 26, the Respondent's president and chief executive officer, J.C. Egnew, met with strikers on the picket line and discussed issues that were also subjects of negotiations. After the meeting, employees felt confident that the strike would be resolved. As explained below, however, witnesses gave conflicting testimony as to what Egnew said at the meeting.

About October 4, the Respondent tendered a new contract proposal. The employees rejected it, feeling that it was regressive and that it failed to live up to the expectations they had formed as a result of the September 26 meeting with Egnew.

About November 9, a union representative held a meeting attended by 35 of the 88 strikers. He told the strikers that the Respondent had been committing unfair labor practices and specifically mentioned the September 26 meeting. The 35 strikers present voted unanimously to continue the strike as an unfair labor practice strike.

The Respondent made another contract proposal in mid-November. During a November 16 meeting to vote on the proposal, employees expressed anger and disappointment that Egnew had lied to them at the September 26 meeting, that he had broken his promises to them, and that he had told employees to "trust him" and then failed to help them. The employees rejected the Respondent's contract proposal, and the strike continued.

About February 26, 1997, the Union made an unconditional offer to return to work on behalf of the striking employees. The Respondent refused on the basis that it had permanently replaced the strikers. About March 6, 1997, the Respondent withdrew recognition from the Union, relying on a decertification petition that included signatures from the replacements.

At the hearing, witnesses gave conflicting testimony on what occurred at the September 26 meeting. The General Counsel's witnesses testified that Egnew told strikers to "trust him" and promised the strikers that he understood their problems and would "look into" or "fix" them. The Respondent's witnesses, on the other hand, testified that Egnew made no promises to the strikers, did

league would ask the judge to address the Respondent's argument that union acquiescence in the meeting precludes a finding of direct dealing. We find that unnecessary, because the acquiescence issue does not affect our conclusion that the strike remained economic. If the employees' bargaining representative did acquiesce, there would be no unlawful direct dealing and therefore no unfair labor practice on which to base a finding that the strike converted to an unfair labor practice strike. If the employees' bargaining representative did not acquiesce and the Respondent did engage in unlawful direct dealing (as we have assumed in our analysis above), the General Counsel still failed to prove that direct dealing contributed to prolonging the strike.

[9] Member Liebman dissented in *Hacienda*, supra, but agrees that it establishes that the Respondent acted lawfully in ceasing to withhold union dues.

[1] All dates are in 1996 unless otherwise specified.

[2] Regardless of the character of the strike, I agree with my colleagues that the Respondent lawfully ceased withholding union dues in August 1997. See *Hacienda Resort Hotel and Casino*, 331 NLRB No. 89, slip op. at 3 (2000). Therefore, I would not remand that issue.

not tell them to "trust him," and did not say anything that had not already been discussed at the bargaining table.

The judge made no specific findings on what Egnew said at the meeting, nor did he make any express credibility determinations that would resolve the conflicting testimony. He simply found that Egnew talked to the strikers about certain issues that were subjects of bargaining. He then concluded that Egnew engaged in unlawful direct dealing. The judge found, however, that the direct dealing did not contribute to prolonging the strike, and therefore that the strike remained economic at all times. Accordingly, he dismissed the allegations that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the strikers on demand and Section 8(a)(5) and (1) by withdrawing recognition based on a decertification petition signed by
the replacements.

The Union excepted to the judge's failure to make an explicit finding that Egnew promised the strikers to try to resolve their complaints or "fix" their problems. The Union also excepted to the judge's failure to find that Egnew's direct dealing prolonged the strike. The Respondent excepted to the judge's finding that Engew engaged in unlawful direct dealing. The Respondent argues that Egnew did not make any promises or other statements that would constitute direct dealing. The Respondent further argues that the acquiescence of the employees' bargaining representative in the meeting precludes a finding of direct dealing. The Respondent contends that both the Local and International union represented the employees, that Local union representatives arranged and attended the meeting, and that an International union representative knew about the meeting in advance and made no effort to cancel it. The Union denies that it acquiesced in direct dealing and argues that the International, not the Local, was the exclusive bargaining representative.[3]

My colleagues conclude that even assuming Egnew engaged in unlawful direct dealing by promising the strikers that he would resolve their complaints, the evidence does not support a finding that his direct dealing contributed to prolonging the strike. I disagree.

I find merit in the Union's argument that if Egnew unlawfully made promises to the employees on September 26, those promises may have contributed to prolonging the strike.[4] Thus, Egnew's promises may have raised strikers' expectations that the Respondent would propose a contract acceptable to them and that the strike would soon end. When the Respondent's October 4 proposal was received, the expectations resulting from the direct dealing were crushed, leading to consternation among the strikers. I do not find it dispositive that the employees became angry only after receiving the October 4 proposal, or that their complaints focused on the terms of the proposal rather than the fact that Egnew had dealt with them directly. The employees were angry about the proposal because it indicated to them that Egnew had lied and broken the promises he made—unlawfully—at the September 26 meeting. But for Egnew's direct dealing at that meeting, there would have been no lies, no promises to break, and no crushed expectations. One of the dangers inherent in direct dealing is that the employer's proposals or promises change employees' expectations about what the parties can realistically achieve in bargaining, making it more difficult to reach agreement. That is what the Union argues occurred here: Egnew made promises to the strikers that raised their expectations. The Respondent's subsequent contract proposals failed to live up to these promises, angering employees and contributing to their decision to reject the proposals and continue striking. Therefore, if Egnew did unlawfully promise the strikers to resolve their complaints, I cannot agree with my colleagues that his direct dealing failed to cause consternation among the strikers or contribute to prolonging the strike.

However, the testimony is in conflict and the judge's decision is unclear on whether Egnew actually promised the strikers anything. In addition, the judge made no factual findings that resolve the issue of whether the employees' bargaining representative acquiesced in the direct dealing. Therefore, in the absence of additional findings on Egnew's statements at the September 26 meeting and the role of the employees' bargaining representative in that meeting, I can neither adopt nor reverse the judge's conclusions that the Respondent engaged in unlawful direct dealing, but that the direct dealing did not contribute to prolonging the strike.

Accordingly, I would remand this case for further findings. I would instruct the judge to make specific findings on what occurred at the September 26 meeting, including credibility determinations to resolve the conflicting testimony regarding Egnew's statements to the strikers. Furthermore, I would instruct the judge to address whether the employees' bargaining representative acquiesced in the direct dealing by its involvement in the Sep-

[3] The Respondent raised the acquiescence issue below. Although the judge's conclusion that direct dealing occurred suggests that he implicitly rejected the Respondent's argument, the judge did not specifically address it in his decision.

[4] The standard for determining whether a strike has been converted is well established: the unlawful conduct need not be the "sole or predominant" factor that caused a prolongation of the work stoppage; it is sufficient for the record to show that the unlawful conduct was "a factor." *C-Line Express*, 292 NLRB 638 (1989).

tember 26 meeting. I would ask the judge in addressing this issue to determine which entity (International, Local, or both) was the employees' bargaining representative and what participation, if any, that representative had in the September 26 meeting.[5] Finally, assuming that the judge again finds that the Respondent engaged in unlawful direct dealing, I would instruct the judge to reanalyze, in light of his additional findings, whether that direct dealing converted the strike to an unfair labor practice strike.

Dated, Washington, D.C. November , 2001

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

James E. Horner, Esq., for the General Counsel.
Edwin S. Hopson, Esq., of Louisville, Kentucky, for the Respondent.
Ira J. Katz, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Whitley City, Kentucky, on June 15 and 16, 1999, following a decision and order of the Board dated February 19, 1999, denying the Respondent's Motion for Summary Judgment dated August 5, 1997. At issue here is whether a strike commenced by the Respondent's employees on August 12, 1996, was converted to an unfair labor practice strike thus entitling those employees to immediate reinstatement when they made the demand on February 26, 1997. The Respondent argued that the alleged unfair labor practices (threats of plant closure and direct dealing with employees by then CEOs of the Respondent in August and September of 1996) were settled and by agreement approved by the Regional Director on January 31, 1997. The Board rejected this argument because of certain reservation language in the settlement agreement, and likewise rejected the Respondent's other bases for summary judgment.

It is alleged here that the Respondent's refusal to reinstate on demand all the strikers on February 26, 1997 (with the exception of certain named individuals who it is agreed engaged in picketline misconduct), violated Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* And its withdrawal of recognition on March 6, 1997, violated Section 8(a)(5).

The Respondent generally denied that it committed any violations of the Act, contends that at all times the strike was economic and that the strikers had been permanently replaced prior to their demand for reinstatement and affirmatively reserved the arguments made in its Motion for Summary Judgment.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following findings of fact, conclusions of law, and recommended order.

I. JURISDICTION

The Respondent is a Kentucky corporation engaged in the manufacture of tents, primarily for military use at a facility in Stearns, Kentucky. In the operation of this enterprise, the Respondent annually ships directly to points outside the State of Kentucky goods valued in excess of $50,000. The Respondent admits, and I find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Union of Needletrades, Industrial and Textile Employees, (UNITE), AFL–CIO, Tennessee and Kentucky Division (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Respondent began operations in 1972 making family camping tents and ultimately became the second largest supplier of family camping tents in the United States. In the early 1980s, the business shifted to making tents for military use.

For many years, the Union (or its predecessor) has been the bargaining representative of the a unit of the Respondent's production and maintenance employees. In the summer of 1996,[1] the Union and Respondent began negotiations for a new collective-bargaining contract. Unable to reach what the employees considered a satisfactory agreement, on August 13, they went on strike. The strike lasted until February 26, 1997, at which time the Union made an unconditional offer on behalf of the striking employees to return to work. At that time there were no job vacancies since the strikers had been permanently replaced. Subsequently, however, most were offered jobs and most declined. Following receipt of a petition from a majority of the then work force, on March 6, 1997, the Respondent withdrew recognition from the Union.

On the first day of the strike, and again on September 10, the Respondent's then president, Larry Lockhart, went to the picket line and talked to the strikers. Ella Massengale, the Union's chief steward, testified that "the morning after we had a truck incident" (making the date September 10) Lockhart came to the picket line and talked with employees about two or three hours. He told them he needed the strikers back in the plant, "that he wouldn't replace us," "because if he did the new replacements couldn't handle the job and he would have to lock the doors." Lockhart also discussed with them medical insurance and he listened to complaints about specific managers and supervisors. Lockhart told them he knew there was a problem with the new

[5] I would not, however, find that the mere failure of the International representative to cancel the meeting constitutes acquiescence in unlawful direct dealing, even if the International is found to be the employees' bargaining representative.

[1] All dates are in 1996, unless otherwise indicated.

rating system (by which employees' pay was calculated) and that he would look into it.

Lockhart resigned on September 25 or 26, and James Egnew[2] again became the Respondent's president. In late September, Egnew came to the picketline and talked with strikers about 2 hours. He and the pickets discussed various items in issue, including medical insurance, employee problems with management, and the rating system. After this, the employees were generally confidant that their issues would be resolved and that an acceptable contract would be reached.

However, after the bargaining session of October 4, the employees felt that the company's position was no different than it had been. Thus, the employees met on November 9, at which time union representative Mark Pitt said that the Respondent had been committing unfair labor practices and that the employees should consider changing the nature of the strike from economic to unfair labor practice. The 35 or so employees present voted to do so. In the words of Union Secretary/Treasurer Lloyd Lynch, the strike "was an unfair labor practice strike from the beginning or should have been." He testified, "I based that on the amount of money being made per hour. The rate system. The Management the conduct toward the people." He noted that no one was making more than $4.75 per hour and "for an eighteen to twenty year veteran that's unfair all the way to me."

Massengale testified Pitt had told them that Egnew coming out on the picket line and the way employees were being treated were unfair labor practices. However, she also testified that if the Respondent agreed to pay $7.50 per hour, the strike would have been over. She testified, "This was an unfair labor practice strike and not an economic and we was out for better Management and be treated better." The picket signs were changed to reflect that the strike was now being considered a protest of the Respondent's unfair labor practices.

On November 27, the Union filed an unfair labor practice charge alleging threats and direct dealing with employees by Lockhart on September 10 and Egnew in late September. The Regional Director for the Ninth Region approved settlement of this matter on January 31, 1997, and the Respondent posted an appropriate notice. On August 7, 1997, the Respondent moved for summary judgment of the instant complaint on grounds that the underlying unfair labor practices (if any) had been remedied and therefore could not form the basis for converting the strike from economic to unfair labor practice. As noted above, the Board denied this motion by Order dated February 19, 1999.

The Board concluded that the activity of Lockhart and Egnew, which was the subject of the earlier case, could be considered when determining whether the strike was converted because in the settlement agreement was a specific reservation. However, the General Counsel here does not seek any remedy based on those acts, but only that findings be made that Lockhart and Egnew threatened employees and dealt directly with them, by-passing the Union.

[2] The transcript is corrected to reflect the correct spelling of his surname.

B. Analysis and Concluding Findings

1. The threats and bypassing the Union

There is no testimony that Egnew, when talking with picketers in late September, said anything which would amount to a threat in violation of the Act. Lockhart did state that if the picketers did not return to work, he would close the plant, but this was in the context of telling them that he could not, and would not, hire replacements. He told employees he would not replace them, but that absent their services, he would have to close. Since this is precisely the aim of a strike—to put economic pressure on an employer—it can scarcely be found a violation for an employer to say so. I doubt that in such circumstances the Board would find a threat in violation of Section 8(a)(1).

However, there is no doubt that both Lockhart and Egnew dealt directly with employees. Each, in his capacity as president and CEO, spent 2 to 3 hours on the picket line discussing with employees a wide range of matters which were also subjects of discussion in contract negotiations. The Board has held that employers can communicate with employees without violating the Act, *Proctor & Gamble Mfg. Co.,* 160 NLRB 334 (1966); however, the type of activity engaged in here the Board has found to undermine the position of employees' collective-bargaining representative and to be unlawful direct dealing. *Harris-Teeter Super Markets,* 310 NLRB 216 (1993). I therefore conclude that in fact the Respondent violated Section 8(a)(5) in bypassing the Union and dealing directly with the employees. However, no remedy is sought for this violation since it was settled by agreement of the parties.

2. Converting the strike from economic to unfair labor practice.

The principal question here is whether this activity was sufficient to cause the employees to prolong the strike. Most recently, in *F. L. Thorpe & Co.,* 315 NLRB 147 (1994), the Board reiterated its standard for determining whether a strike has been converted, quoting from *Gaywood Mfg. Co.,* 299 NLRB 697, 700 (1990), that the General Counsel must prove only that "the unlawful conduct was a factor (not necessarily the sole or predominant one) that caused a prolongation of the work stoppage."

Thus if the evidence suggests that even absent unfair labor practices the strike would have continued conversion can nevertheless be found if there is sufficient objective and/or subjective evidence that the unfair labor practices were in the mix of reasons. Thus, for instance, in *C-Line Express,* 292 NLRB 638 (1989), the Board held that certain unfair labor practices would, by their nature, cause employees to continue striking. In *Thorpe* a high management official repeatedly told the strikers they were fired because they were engaged in protected activity and they should go home. These statements were widely disseminated. The employer also conditioned return to work on the strikers resigning from the union (a condition which was later retracted). Thus notwithstanding the continued economic purpose, the Board found the strike had been converted.

However, the Board has questioned self-serving, after the fact characterizations by strikers of their motive and does not give such evidence much weight. But contemporaneous statements can show motive, such as, the unfair labor practices caused "consternation" among strikers.

Citing *Beaumont Glass Co.,* 310 NLRB 710 (1993), the Union argues that the direct dealing here in fact caused "consternation" because after talking with Egnew, the employees had unrealistic expectations about what the Respondent might be willing to offer. When the Respondent's offer fell short of these expectations, the strike was prolonged. While I find there was direct dealing here, unlike *Beaumont,* the Respondent did not make proposals to employees which had not been made to the Union.

There is no question that here the strike was at its inception, and continued to be, primarily to force economic goals. General Counsel witnesses testified, for instance, that had the Respondent agreed to $7.50 per hour, the strike would have been over. The issue, then, is whether the proven unfair labor practices—the direct dealing—can be said to have contributed in some way to prolonging the strike. I conclude not.

First, I find that the threat attributed to Lockhart was not a violation of the Act. There is no testimony that Egnew made any kind of a threat. Though both Lockhart and Egnew did in fact deal directly with employees, I do not find, in this fact situation, that such would, or did, cause employees to continue striking.

The employees wanted to meet with Lockhart and Egnew, and following these meetings were hopeful that their concerns would be addressed. Indeed, the entire employee complement of the negotiating committee was present at these meetings. It was only after the meeting with Egnew, and the Respondent's failure to offer an acceptable contract, that employees voted to continue the strike as an "unfair labor practice strike."

The subjective evidence from employees is that they voted to convert the strike, but were of the opinion that low wages and other concerns in negotiations were unfair labor practices. There is nothing in the testimony of any striker that direct dealing was of any particular significance to them. Further, while the vote to convert the strike was unanimous of those present, only about 35 of the 88 strikers were present.

Accordingly, I conclude that a preponderance of the credible evidence does not establish that the strike was in any way prolonged by the Respondent's unfair labor practices. The strikers at all times were economic strikers. Thus, they were not entitled to reinstatement on demand. The evidence shows that in fact the Respondent offered reinstatement appropriately.

3. Withdrawal of recognition

It is alleged and admitted that the Respondent withdrew recognition from the Union, on March 6, 1997. According to the Respondent, this was based on its good faith belief that the Union no longer represented a majority of employees in the bargaining unit, since it had been given a petition signed by 110 employees between February 7 and February 24, 1997. On March 10, 1997, the Respondent filed a RM petition with the Board.

The General Counsel bases this allegation on the theory that the strike had been converted and therefore most of the employees signing the petition should have been discharged in favor of the strikers who had asked for reinstatement on February 26. There is no issue here that the striker replacements were not permanent. C.f., *Target Rock Corp.*, 324 NLRB 373 (1997).

Inasmuch as I have concluded that the strike continued to be economic, the replacements and those who ceased striking constituted the bargaining unit, a majority of which signed the petition. Of course, economic strikers would have had the right to vote in any representation election.

In any event, I conclude that the Respondent did not violate the Act by withdrawing recognition from the Union.

Since the Union ceased to be the bargaining representative, to cease withholding dues pursuant to checkoff was not a violation of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[3]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. September 15, 1999

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.